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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 620

IN THE MATTER OF JAMES M. WRIGHT, DEBTOR.

JAMES M. WRIGHT,

Petitioner,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY,

Respondent.

BRIEF OF RESPONDENT, THE UNION CENTRAL LIFE INSURANCE COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable Harlan F. Stone, Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT.

Neither the Petition for Certiorari nor the brief in support thereof contains any statement of facts or previous procedural steps, nor does either identify the property involved or the particular judgment sought to be reviewed. Most important, Petitioner does not disclose that more

than three years ago this Honorable Court specifically excluded this property from bankruptcy and adjudicated the very issues and the principles upon which Petitioner's contentions herein appear to be based. Hence, it is deemed essential to present a statement of the purview of said previous decision and of the facts pertinent to a consideration of said Petition.

The only property involved herein is the 80.31 acre tract of Indiana farm land which was definitely and finally disposed of by this Honorable Court in its opinion of May 31, 1938. (*James M. Wright* v. *Union Central Life Insurance Company*, 304 U. S. 502, 58 S. Ct. 1025, 82 L. Ed. 1490.) It was there held that the Bankruptcy Court never acquired jurisdiction of said tract and the latter was not subject to administration therein and the judgments of the lower courts were affirmed.

In his opinion, Mr. Justice Reed detailed the facts and pointed out that at the time of filing his original petition (October 29, 1934) under Section 75 of the Bankruptcy Act, Petitioner was not the owner of the 80.31 acre tract, having deeded the same to his son several years before. Hence, that the unauthorized inclusion of this land in Petitioner's bankruptcy schedules could not and did not vest jurisdiction thereof in the Bankruptcy Court.

The opinion also recited that prior to the filing of said Petition under Section 75, Respondent brought suit to foreclose a mortgage it held upon said land, the same resulting in a foreclosure judgment and a sheriff's sale thereunder on July 12, 1934. On April 13, 1935 said tract was reconveyed to Petitioner, but this Court held that the established rule in general bankruptcy applied equally in cases under Section 75 and that property or property rights acquired by a debtor after the filing of his petition were not thereby brought within the jurisdiction of the Bankruptcy Court.

Any contention that this 80.31 acre tract came into the purview of the Bankruptcy Court by reason of the Amendment of August 28, 1935 or the amended petition filed thereunder October 11, 1935 is also completely refuted by said opinion. It is recited that the period of redemption from the foreclosure sale expired on July 12, 1935 and Respondent received the sheriff's deed on August 2, 1935. The Court held that there is nothing in Section 75, "as it now stands" that "indicates any intention that the bankruptcy courts assume control over land not previously within the jurisdiction of a bankruptcy court and already completely divorced from any title of the debtor."

The above decision was occasioned by a review in this Court of judgments of the United States Circuit Court of Appeals (7th Circuit) affirming orders of the District Court (Northern District of Indiana) whereby said 80.31 acre tract was stricken from debtor's (Petitioner's) schedules in bankruptcy proceedings under Section 75(s) and his application to reinstate the land in said schedules was denied. As to this tract the judgments of the District Court and Court of Appeals were affirmed. As to other lands covered by said opinion and *not involved in the present case*, reversals were ordered. This Statement relates only to the 80.31 acre tract.

After the opinion of this Court dated May 31, 1938, Petitioner made no attempt to revive his contentions with respect to this tract until August 15, 1940, more than two years later and after it had been sold to a third party, as admitted in the petition next mentioned. On the last named date Petitioner filed in the District Court a petition asking that the sheriff's sale of July 12, 1934 be set aside and that said tract be restored to his bankruptcy schedules. Respondent promptly filed a written motion to strike and dismiss said petition as insufficient for reasons specified—largely the same as those advanced herein.

In said petition it was not stated or inferred that there was or had been any change in the facts or procedure or any facts newly discovered since the rendition of Mr. Justice Reed's opinion of May 31, 1938. Petitioner's theory appeared to be (as he contends here) that, without specifically designating or inferentially referring to said opinion, the more recent decisions of this Court have effected a reversal of same.

October 24, 1940 the District Court entered an order sustaining Respondent's motion and said petition was thereby stricken and dismissed. A petition for rehearing was filed December 26, 1940 and denied on February 17, 1941. On March 14, 1941, Petitioner filed in the United States Circuit Court of Appeals (7th Circuit) a petition for appeal from *said order of October 24, 1940*, which appeal was allowed on the date filed. In the Assignment of Errors filed therewith, Petitioner alleged error only in the order of October 24, 1940.

Thereafter, upon Petitioner's request, supported by his affidavit that he could not procure an attorney, the Circuit Court of Appeals appointed counsel to represent him in said appeal, designating Mr. Raymond Wallenstein, an able and reputable lawyer. Mr. Wallenstein accepted the assignment, carried it through with careful study and reported his conclusions to the Court in the form of a Request for Instructions. The latter will appear in the record herein and expresses counsel's considered opinion that the appeal sought a reversal by the Court of Appeals of the previous decision of this Court on the same land and issues.

Respondent filed a written motion to dismiss the appeal and to affirm the order entered by the District Court on October 24, 1940 for the reasons, briefly, that by its decision of May 31, 1938, this Court had conclusively disposed of the identical issues concerning the identical tract involved in said appeal and that the latter was not prayed for within

due time under the statute (U. S. C. A. Title 28, Section 230).

On May 8, 1941, without formal opinion, said Circuit Court of Appeals affirmed the orders entered by the District Court on October 24, 1940. Certiorari is sought herein to review said judgment.

We are forced to ask the indulgence of the Court with respect to the absence of record page references in this brief. The record was not printed in the Circuit Court of Appeals and has not been printed here. Largely due to the shortness of time the original transcript has not been available to us. However, we believe that all our statements of fact and of proceedings had will be found to be supported by the record. With the material at land we have earnestly endeavored to attain this end.

SUMMARY OF ARGUMENT.

I.

Res Judicata.

The basic issues presented by the Petition for Certiorari herein were definitely and conclusively adjudicated by this Court in a case between the same parties and involving the same 80.31 acre tract.

James M. Wright v. *Union Central Life Insurance Company*, 304 U. S. 502, 58 S. Ct. 1925, 82 L. Ed. 1490.

A clear instance of *res judicata*.

II.

No Conflict in Decisions.

The petition wholly fails to disclose *any* basis for the granting of a writ of certiorari. There are vague and general assertions of conflict between the decision of the Circuit Court of Appeals on a federal question and applicable decisions of this Court, but the alleged conflict is not specified nor is the nature or degree thereof pointed out. Indeed, the decision of the lower court followed and was based upon the decision of this Court in *Wright* v. *Union Central Life Insurance Company, supra.* There is no occasion for the exercise of this Court's discretionary power under Supreme Court Rule 38, Paragraph 5(b).

The judgment of the Circuit Court of Appeals was not in conflict with either *John Hancock, etc. Co.* v. *Bartels*, 308 U. S. 180, 84 L. Ed. 154; *Kalb* v. *Feuerstein*, 308 U. S. 433, 84 L. Ed. 281; *Borchard* v. *California Bank & Trust Co.*, 310 U. S. 311, 84 L. Ed. 867; *Wright* v. *Union Central*

Life Ins. Co., (decided Dec. 9, 1940) ____ U. S. ____, 85 L. Ed. Adv. Ops. 166, or any other decision of this Court. Not one of these cases cited by Petitioner, is applicable to the instant case and not one of them reverses or modifies in any degree, by expression or implication, the holding of this Court in the first case of *Wright* v. *Union Central Life Insurance Co.*, 304 U. S. 502, 82 L. Ed. 1490.

III.

Petition Based on False Premise.

The petition rests wholly upon the *false premise*,

(a) That Petitioner was owner of the 80.31 acre tract at the time his original petition was filed, October 29, 1934 and that thereby jurisdiction of said land was acquired by the Bankruptcy Court, and

(b) That by the terms of Section 75(s) as amended August 28, 1935, the filing of an amended petition thereunder continued in effect the jurisdiction of the Bankruptcy Court over this tract.

That the foregoing is a false premise is demonstrated by,

(a) The adjudication of this Court in *Wright* v. *Union Central Life Ins. Co.*, 304 U. S. 502.

(b) The provisions of Section 75(s), plus the facts set out in the above Statement.

IV.

Appeal From District Court Was Too Late.

Petitioner's application for appeal from the District Court's order of October 24, 1940 was not filed in the Circuit Court of Appeals until March 14, 1941. This was almost two months beyond the time limited by statute for such appeal. (U. S. C. A., Title 28, Section 230.) The time for appeal was not extended by reason of the petition for

rehearing filed by Petitioner in the District Court on December 26, 1940—long past the ten day period limited by the Rules of Civil Procedure (Rule 59(b)).

Wayne United Gas Co. v. *Owens-Ills. Glass Co.*, 300 U. S. 131, 81 L. Ed. 557.

Soberanes De Cambuston v. *U. S.*, 95 U. S. 285, 24 L. Ed. 448.

Marden v. *Campbell Printing Press, etc. Co.*, 67 Fed. 809 (C. C. A. 1st).

ARGUMENT.

I.

Res Judicata.

We hardly believe it necessary to elaborate further on Point 1 of the above summary, viz., that the basic issues and contentions presented by the Petition for Certiorari are the same as those disposed by this Court, concerning the identical tract of land and between the identical parties, in *James M. Wright* v. *Union Central Life Insurance Company*, 304 U. S. 502, 58 S. Ct. 1025, 82 L. Ed. 1490.

The opinion in said case speaks for itself. Petitioner has failed to indicate any change in the situation which might warrant an abandonment of that opinion or of the principles there announced. This farm long since has been sold by Respondent and all parties (including Petitioner) have relied upon said decision. The petition falls far short of revealing any possible reason to support the relief it prays.

This case plainly is one requiring the application of the principle of *res judicata*. The same issues concerning the same subject-matter and between the same parties already have been adjudicated by this Court.

II.

No Conflict in Decisions.

Rule 38 of this Court, concerning review on certiorari, is clear and definite. We sincerely and respectfully urge that the Petition herein utterly fails to demonstrate a single reason of the character required by said Rule for consideration.

Page 5 of the Petition contains the only "reason" asserted, viz., that the decision of the Court of Appeals is in conflict with "applicable decisions of the Supreme Court." That general statement is not amplified there or elsewhere in the Petition (or brief in support thereof) by any specification pointing out the so-called "conflict" nor the extent or nature thereof. Vague generalties are not within the purview of clause 5(b) of Rule 38, which is cited on said page 5 of the Petition.

Without identification thereof, Petitioner, nevertheless, argues at length that the Court of Appeals order presented a "conflict." We would not be warranted in ignoring same and in failing to make answer thereto.

It is manifest that in its order of October 24, 1940 the District Court followed the dictates of this Court as expressed in the Wright opinion of May 31, 1938 and that the Circuit Court of Appeals did likewise in its affirmance. Said opinion then stood and still stands without reversal or modification.

Petitioner asserts that the Circuit Court of Appeals failed or refused to give effect to Section 75(s) and that therefore its decision was in conflict with *John Hancock, etc. Co.* v. *Bartels, supra, Kalb* v. *Feuerstein, supra, Borchard* v. *California Bank & Trust Co., supra,* and *Wright* v. *Union Central Life Ins. Co.* (decided Dec. 9, 1940), *supra.* If, as must be clear, the orders of the lower courts were consistent with this Court's decision in *James M. Wright* v. *Union Central Life Ins. Co.,* 304 U. S. 502, it *must* be the further contention of Petitioner that the latter decision was overruled by the Bartels, Kalb, Borchard or second Wright opinions—or by all of them.

Petitioner does not *express* this contention but that could not be expected—in view of *his careful avoidance of any mention of the first Wright opinion.* Nevertheless, we cannot escape the necessary *inference* and will answer it to-

gether with the assertions *expressed* in the petition. An answer to the one should suffice as an answer to the others.

It should first be noted that no reversal or modification of the Wright decision (304 U. S. 502) is expressed or intimated in either of the more recent opinions cited by Petitioner and listed above. There is no indication that this Court intended them to constitute a departure in *any* degree, from that in said Wright case. Due to manifest differences in *facts,* neither the Bartels, Kalb or Borchard decisions is "applicable" to the holdings of the Circuit Court of Appeals—or of this Court as to the 80.31 acre tract.

In the Bartels case, *supra,* the Bankruptcy Court *duly acquired jurisdiction* of the debtor and his property by virtue of a petition under amended Section 75(s) praying to be adjudicated a bankrupt and for other relief as provided by the statute. The adjudication was had but was later set aside, further relief was refused and the whole proceeding dismissed. This Court affirmed a reversal of the District Court's action, stating that it was concerned only with the duty of the District Court to follow the procedure defined by the statute. The initial *jurisdiction* of the Bankruptcy Court was not questioned.

In *Kalb* v. *Feuerstein, supra,* the debtor filed a petition for relief under amended Section 75(s) before he had been wholly divested of title to his land. Nevertheless, the foreclosure proceeding in the State Court was completed and orders were entered therein *after* said petition was filed. Under previous decisions of this Court it is clear that the Bankruptcy Court acquired exclusive jurisdiction of debtor's land upon the filing of his petition and the State Court proceedings thereafter were of no effect.

Borchard v. *California Bank, supra,* was a case in which jurisdiction of the Bankruptcy Court over debtor's land was first invoked by petition filed under original sub-sec-

tion (s). After the latter was held invalid (*Louisville Bank* v. *Radford*, 295 U. S. 555) this petition was dismissed and subsequently debtor petitioned for reinstatement pursuant to the provisions of Section 75(s), as amended. The jurisdiction thereby regained by the Bankruptcy Court was conceded. After many months, during which it failed to follow the procedure required by the statute, that Court released the land from its jurisdiction. The order was reversed by this Court and the case remanded for administration in the District Court pursuant to the statute.

In the Bartels and Kalb cases the jurisdiction originated under Section 75(s), as amended August 28, 1935, by virtue of petitions filed thereunder *before debtors had been completely divested of title to the lands or substantial rights therein.* In the Borchard case jurisdiction originated by proceedings under the first Frazier-Lemke Amendment while debtor owned the land and was regained pursuant to clause 5 of amended sub-section(s). Jurisdiction was never controverted.

On pages 17, 18 and 21 of his brief Petitioner refers to the decision of this Court in *Wright* v. *Union Central*, rendered December 9, 1940, and insists that the judgment complained of herein is in conflict therewith. He fails or refuses to recognize that in its previous decision (which he ignores) concerning the 80.31 acre tract involved herein this Court found and held that the facts and the law applicable thereto differed radically from those relating to the 200 acres covered by the opinion of December 9, 1940. Any effort by us to elaborate on the distinction made by this Court would be superfluous.

While it is not mentioned in the brief, the Petition (pp. 8, 9) refers to the minority opinion in *Union Joint Stock Land Bank, etc.* v. *Byerly*, 310 U. S. 1, 84 L. Ed. 1041, suggesting that same be applied to the instant facts and made the majority opinion herein. Discussion of the two

opinions in the Byerly case is uncalled for and would be out of order here. The majority opinion cites with approval the previous decision as to this tract and the principles urged in the minority opinion would have no application to a case where (as here) the Bankruptcy Court never had acquired jurisdiction of the land under original Section 75(s). The earlier Wright decision is not criticized or even mentioned in the latter opinion.

It is difficult to understand the contention that either of these decisions could have any application to the instant case wherein the debtor had no right, title or interest to or in the 80.31 acre tract when he scheduled it with his petition under original Section 75 and 75(s) and the only right (being a right to redeem) *thereafter* acquired by him (and not subject to the pending bankruptcy proceeding) had been irrevocably lost by the expiration of the redemption period and the delivery of deed *prior* to the Amendment of August 28, 1935 and the filing of his petition thereunder. It is even more difficult to understand the *inferred* contention that said decisions were intended to and did reverse or modify this Court's opinion of May 31, 1938.

III.

Petition Based on False Premise.

In the opening paragraph of the Petition for Certiorari herein (entitled "1. Summary statement of matters involved."), Petitioner states his basic contention,

> "that *his* real estate was in bankruptcy by virtue of his petition and schedules under amended sub-section (n) of the Act of August 28, 1935." (Italics ours.)

From the assertions on page 2 of the Petition, point 3 on page 16 of the brief in support and the first three points in Summary of Argument in said brief (pages 19, 20), we gather that Petitioner means to couple the statement above

quoted with an inferred (but not expressed) contention that jurisdiction of the Bankruptcy Court originated with his first petition under Section 75 and that sub-section (n) of the new Act restored same. The Petition and brief are not easy to follow but this is our interpretation of same.

Point 3 of our Summary refers to the above. The entire Petition and the brief in support thereof are founded on the false premise of *property ownership by Petitioner* and consequent jurisdiction in bankruptcy. If, either at the time Petitioner filed his original petition under Section 75, his amended petition under the first sub-section (s), or his petition under the Act of August 28, 1935, he had owned the 80.31 tract or any substantial property right therein (such as an equity of redemption), the jurisdiction of bankruptcy with regard thereto would have been established. That question has been determined repeatedly by the decisions of this Court. But such was *not* the case and Petitioner's false premise cannot stand.

First. In the Wright decision of May 31, 1938 (304 U. S. 502) this Court specifically found and held that Petitioner did not own this land or any right therein when his petitions under Section 75 and original (s) were filed and that not until long thereafter (April 13, 1935) was the equity of redemption conveyed to him. That right of redemption expired July 12, 1935 and on August 2, 1935 the final deed under the foreclosure action issued to Respondent. This Court held that thereby said land became "completely divorced from any title of the debtor" and was not "brought within the purview of the bankruptcy court by the Act of August 28, 1935, amending Section 75 (s) or the filing of an amended petition under this section on October 11, 1935."

Second. We shall not reiterate the facts relating to this tract as same already have been set out fully herein. However, to further establish the fallacy of Petitioner's assumptions, we venture to refer to the exact provisions of

the statute. Sub-section (n) of Section 75 (as it stood when the original petition was filed thereunder), read:

> "The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed."

In general bankruptcy only property owned by the bankrupt at the time of filing his petition in bankruptcy is thereby submitted to the jurisdiction of that Court. Property acquired by him thereafter is excluded.

> *Thompson* v. *Fairbanks,* 196 U. S. 516, 49 L. Ed. 577.
>
> *Everett* v. *Johnson,* 228 U. S. 474, 57 L. Ed. 927.
>
> *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 78 L. Ed. 1230.

The original sub-section (n) is quoted above to show that no change in this general bankruptcy rule was effected as to cases instituted under original Section 75(s). This was also recognized in the first Wright opinion which further observed (by foot-note) that in considering the 80.31 acre tract the Court was not concerned with any terms of Section 75(n) as amended August 28, 1935, regarding after acquired property.

When the amended petition under amended Section 75(s) was filed, the period for redemption allowed Petitioner by the Indiana statute had expired as to the land here involved. Ind. Ann. Stat. (Burns, 1933). Sec. 2-3909, 2-4001. Also, final deed had been delivered to Respondent by the

sheriff. Amended sub-section (n) designates the property brought within the jurisdiction of the Bankruptcy Court by a petition under the amended Act and excludes property not owned by the debtor. It further provides:

> "In all cases where, at the time of filing the petition, the period of redemption *has not* or *had not* expired * * * or where deed *had not been delivered*, the period of redemption shall be extended * * * for the period necessary for the purpose of carrying out the provisions of this section." (Italics ours.)

Hence, by the express provisions of the statute, both before and after the Amendment of August 28, 1935 this tract was excluded from the jurisdiction of the Bankruptcy Court. Petitioner's basic premise fails and the lower court orders stand not only upon the doctrine of *res judicata*, but upon the terms of the statute alone.

IV.

Appeal From District Court Was Too Late.

On *October 24, 1940*, the District Court entered the order from which Petitioner appealed to the Circuit Court of Appeals. Review of the affirmance by the latter is sought here. The petition for said appeal (dated March 12, 1941) was not filed in the Court of Appeals until March 14, 1941, and referred only to the order of October 24, 1940. The Assignment of Errors submitted with said petition covered this order alone. The appeal was granted, "but without prejudice to Appellees' right to move to dismiss said appeal when the entire record is before this Court." (See C. C. A. order of March 14, 1941, in original record filed in this Court).

When the entire record reached the Court of Appeals Respondent filed therein its motion to dismiss said appeal and to affirm the order of October 24, 1940, in the Court below on the ground, among others, that said appeal was

not prayed until after the expiration of the three months period allowed by the statute, Section 230, U. S. C. A. Title 28, which provides:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

The order of the Circuit Court of Appeals, May 8, 1941, involved herein did not dismiss the appeal but did affirm the order of October 24, 1941. As indicated by its order the Circuit Court of Appeals heard arguments on the merits of the appeal as well as on the point here urged.

Citation of authority in support of said statutory limitation is hardly necessary as it has long been sustained by this Court. However, we might mention that it was likewise recognized in a recent decision cited by Petitioner on another point, *Wayne United Gas Co.* v. *Owens-Ills. Glass Co.*, 300 U. S. 131, 81 L. Ed. 557.

Of course, that decision, as well as many others of this Court, also recognizes that the time limitation *may* be suspended by an intervening motion for a rehearing or new trial, *provided* (among other requisites) it is filed in due season. If there was no suspension of time in this instance it is manifest that the application for appeal was not made within the three month period required by the statute.

The record herein will show that on December 26, 1940, Petitioner filed a petition for a rehearing as to the order of October 24, 1940. However, this petition could effect no suspension of the period allowed for appeal as *it was filed too late* and there is no showing of proper and timely service thereof.

The Rules of Civil Procedure prescribed by this Court for the District Courts are now applicable to proceedings in bankruptcy (Rules in Bankruptcy, Nos. 36, 37). Rule 59(b) represents an amalgamation of the provisions of

Equity Rule 69 concerning petitions for rehearing and the statute (U. S. C. A. Title 28, Sec. 391) as to new trials and provides as follows:

> "A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and rehearing and on a showing of due diligence."

We are not concerned with the exception provided in the rule quoted as there is no possible basis for the application thereof in this case.

The 10-day limitation of the above rule represents the "yardstick" Petitioner was obliged to follow and he failed to do so—by almost two months. Accordingly, the statutory period was not extended by his tardy move for a rehearing.

Soberanes De Cambuston v. *U. S.*, 95 U. S. 285, 24 L. Ed. 448.

Marden v. *Campbell Printing Press etc. Co.*, 61 Fed. 607 (C. C. A. 1st).

Conclusion.

It is respectfully submitted that Petitioner has demonstrated no ground for the granting of the Writ of Certiorari and that his petition should be denied.

Respectfully submitted,

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